of the slaves; that the marriage ceremonies were publicly celebrated, often by the ministers of the gospel, and were sanctioned by the churches of the country. * * * The children born of those marriages were regarded as standing upon a different plane to those slave children who were bastards pure and simple."[3] At best the question of relationship is one of fact, and if a negro can prove to the satisfaction of the court his line of descent—and there was no question on that score in the case before us—though it pass through slave ancestry, he should be entitled to the same consideration as a native born white person.

In a North Carolina case[4] in point two brothers born of slave parents had been held entitled to inherit the estate of their father and upon the death of one of them the survivor was held to be his heir, notwithstanding a code provision similar to that in the case here. There may have been some other provision applicable to the case, for the court stated that "the right of inheriting thus conferred," referring to the first code provision mentioned, "does not extend beyond parents and children and the estate of such parents;" and it may be that the fact that the brothers were heirs of their father had some bearing in the matter. These considerations might distinguish the case from the Tennessee case, in which it is cited, but on the face of it it is an authority to the contrary despite the contradictory statement in the opinion. On the whole we feel that the brothers and sisters were entitled to take as collateral heirs and that a decision to that effect, which would have declared the Tennessee statute as construed by the Supreme Court of that State unconstitutional, would have had the support of common sense.

WHAT FACTS ARE NECESSARY TO MAKE A CASE AGAINST AN AUTOMOBILE OWNER?

In a recent case[1] decided by the Supreme Court of Massachusetts it was held that proof that the defendant owned the automobile, and that the chauffeur was his servant, and that he was driving the car at the time of the accident does not make out a *prima facie* case, that the chauffeur, when he ran into the plaintiff's intestate, was driving the car for a purpose within the scope of his employment.

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[3] *Williams v. Kimball,* 35 Fla. 49.

[4] *Jones v. Haggard,* 108 N. C. 178.

[1] *Hartnett v. Gryzmish,* 105 N. E. (Mass.) 988.

The court did not consider that when these facts were shown an inference arose that the chauffeur was acting within the scope of his employment. This inference was necessary to constitute a *prima facie* case. In failing to give rise to the presumption, it is contended that the Court was in error.

A presumption is a probable inference which our common sense draws from circumstances usually occurring in such cases.[2] A presumption is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts that are known.[3]

Courts must decide questions of law on precedent or on principles of justice and reason, when there is no precedent. It is submitted, that as a fact of ordinary experience, it is reasonable to presume in the big majority of cases that when the chauffeur is driving his master's car, accompanied by the master or not, that he is acting within the scope of his employment. In addition, by recognizing this presumption, no injustice would be done to the master. The result would be to charge the master with a fact which the big majority of ordinary and reasonable people would infer from these circumstances. Another result of raising this presumption is to shift the burden of proceeding with the proof from the plaintiff to the defendant to the extent of balancing the scales of evidence and thereby refuting this *prima facie* case. And it is submitted that the defendant is the party upon whom the burden of proceeding with the evidence ought to be. When a servant who is employed for the special purpose of operating an automobile for a master, is found operating it in the usual manner, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master and the burden should be on him to overthrow this presumption by evidence of which the law presumes he is in possession. It would be a hard rule to require the party complaining of the tortious act to prove by positive proof that the servant was acting within the scope of his employment.[4]

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[2] *Newton v. State*, 21 Fla., 53, 98.

[3] *Home Ins. Co. v. Weide*, 78 U. S. 438; *Hilton v. Bender*, 69 N. Y. 75, 82.

[4] *Long v. Nute*, 123 Mo. App., 204, 209; *Shamp v. Lambert*, 121 S. W. (Mo.) 770; *Edgeworth v. Wood*, 58 N. J. L. 463; *Schuete v. Holliday*, 54 Mich. 73; *Laman v. Hohler*, 122 N. Y. 646; *Knust v. Bullock*, 59 Wash. 141; *Ludgberg v. Barghoorn*, 131 Pac. (Wash.) 1165.

In the case of *Purdy v. Sherman,* 74 Wash. 309, the Court went a step further and held that where it is shown that the wagon and team belonged to the defendant at the time of the injury, that fact establishes *prima facie,* that whoever was driving was doing it for the owner.

The Court relies on *Bourne v. Whitman,* 209 Mass. 155, as an authority for their decision on this point, but the point involved there was whether or not the son was in fact chauffeur for the father and not whether he was acting within the scope of his employment. The relation of master and servant was proved. Also *Reynolds v. Denholm,* 213 Mass. 576, is mentioned. There the defendant employed a chauffeur who took his meals and had his laundry done elsewhere. The master permitted him to use his car to go for his meals and laundry as he found it convenient. While going for his laundry he ran into the plaintiff and injured her. The Court said, "If under these circumstances the jury should find that this use of the machine was assented to by the defendant, then he would be liable." The Court also did not see how as a matter of law they could rule that the jury could not so find. In the principal case, allowing the presumption, it would not preclude the jury from a contrary finding unless the *prima facie* case was not refuted. There are other cases which seem to agree with the principal case but the facts are not analogous.[5] Many of these cases fail to distinguish between burden of proceeding with the evidence and the burden of proof.

That the rule as suggested is reasonable, based upon common sense, upheld by decisions in other states, and consistent with well-recognized rules in regard to presumptions, are reasons for questioning the soundness of the rule laid down in the principal case.

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[5] *Farber v. Railway,* 116 Mo. 81; *Lotz v. Hanlon,* 217 Pa. 239; see 227 Pa. 448.